United States Court of Appeals

for the Second Circuit

APPELLEE'S BRIEF

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75-1212

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P/S

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

DOCKET NO. 75-1212

UNITED STATES OF AMERICA,
Appellee,

-against-

CHARLES LUCCHETTI,

Defendant.

ALBERT SANTORO, LAURA SANTORO and
ROSE M. SANTORO,

Sureties-Appellants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

BRIEF FOR THE APPELLEE

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2

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

TABLE OF CONTENTS (2)

UNITED STATES COURT OF APPEALS
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- X

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PRELIMINARY STATEMENT

This is an expedited appeal pursuant to 28 U.S.C. §1291 from a memorandum/decision and order of the United States District Court for the Eastern District of New York, Jacob Mishler, Chief District Judge, denying an application for remission of a judgment rendered in favor of the appellee and against, inter alia, the appellants subsequent to the forefeiture of bail in the amount of $200,000, secured by $7,500 cash deposited with the District Court and certain real property owned by the appellants (as well as properties owned by other sureties who have not appealed the decision below).

ISSUES PRESENTED

1. Did the District Court abuse its discretion in denying remission?

2. Does justice require the enforcement of the judgment below?

STATEMENT OF THE FACTS

Following his release on bail pending trial on New York State charges stemming from the May 13, 1971 attempted robbery of the First National Bank of Bayshore, Charles Lucchetti ("Lucchetti") was arrested by federal officers for his participation in and planning of the December 20, 1970 armed robbery of the same bank. On July 20, 1971, the Grand Jury returned a three count indictment against Lucchetti, charging him with violations of 18 U.S.C. §2113(a) and (d) and 18 U.S.C. §371 (71 CR 849, E.D.N.Y.). Bail was set at $75,000, but was not posted by Lucchetti; he remained in federal custody.

On August 5, 1971, the jury found Lucchetti guilty of aggrevated bank robbery (18 U.S.C. §2113(d)) and conspiracy (18 U.S.C. §371). A sentence of 20 years imprisonment and $15,000 in fines was imposed by Chief Judge Mishler.

Lucchetti then applied to the District Court for relief pursuant to 18 U.S.C. §2255. In a Memorandum of Decision and Order dated December 16, 1974, Judge Mishler declared a mistrial, set aside the judgment of conviction, and granted Lucchetti a new trial. Bail was continued at $75,000, to be secured by a surety company bond (145a).

Lucchetti, however, found it impossible to obtain the required commercial bond, as the security offered by family members on his behalf was considered inadequate in light of the amount of bail involved and the seriousness of the charges pending (50a-51a). He, therefore, moved the trial court for a reduction of bail. At a hearing before Chief Judge Mishler on December 24, 1974, counsel for Lucchetti, H. Elliot Wales, explained to the court Lucchetti's inability to secure the necessary surety company bond, and requested that the District Court reduce the bail to an amount sufficient such that a commercial surety would accept as security therefor the equity in four houses which members of Lucchetti's family (including appellants) had volunteered to post, together with a small amount of cash (51a). Conceding the seriousness of the charges against Lucchetti and the Government's right to demand adequate security to assure his appearance at trial, counsel argued that the bail sought would sufficiently tie up the family asset-wise and thereby ensure Lucchetti's appearance (56a-57a).

The District Court denied the request for bail reduction, citing Lucchetti's long history of criminal behavior, the sufficiency of the evidence adduced in support of the conviction and allegations of Lucchetti's intimidation of witnesses

(57a-58a). The trial court did recognize, however, that Lucchetti had a statutory right to bail pending trial, and thus turned its attention to the question of adequate security. Responding to counsel's own suggestion that Lucchetti's family was willing to secure his release with their homes, the Court specifically indicated on the record that breach of the conditions being set would result in forfeiture of the full amount of bail. Then, suggesting that the family could possibly lose everything, the Court modified the conditions of bail previously set, requiring a $75,000 personal appearance bond, secured by the equity in, inter alia, the involved properties, $7,500 cash, and the signature of all sureties on the bond (58a-60a).

On January 9, 1975, Lucchetti offered to meet the conditions of bail set by the Court. However, on the same day, the Grand Jury handed down a six count indictment charging Lucchetti with three additional armed bank robberies. (75 CR 25, E.D.N.Y.). The District Court thereupon increased bail to $200,000 surety company bond. Lucchetti and the involved sureties (including appellants) at this point offered to execute a $200,000 personal appearance bond secured by the property and cash previously posted with the Court on the earlier indicment, 71 CR 849 (107a).

At a hearing conducted January 22, 1975, the Government offered (in opposition to Lucchetti's then pending bail application) the testimony of two Suffolk County detectives linking Lucchetti to the murder of Robert Chaffin, one of his accomplices in the bank robberies covered under indictment 75 CR 25. (Chaffin had been scheduled to appear before the Suffolk County grand jury to offer testimony concerning the robberies; prior to testifying, however, he was found dead in his home with six bullets lodged in his skull and a dead canary next to his body. See 107a-108a).

In a lengthy memorandum decision dated Janaury 30, 1975, the District Court found as a fact for the purposes of setting bail that Chaffin's murder had been planned by Lucchetti to prevent Chaffin from testifying before the Grand Jury. Noting that Lucchetti had travelled to Las Vegas on the weekend of the murder for the purpose of establishing an alibi, the Court found that Lucchetti had received a phone call soon after the murder confiming the execution, and had thereafter remarked "[o]nly the canary knows" (108a).[1/]

1/ The Court also found that the murder had been committed by one John Greenmeir, who was subsequently killed by police during a bank robbery on May 15, 1971, in connection with which Lucchetti was arrested and indicted on New York State charges.

The Court readily agreed with the Government that Lucchetti presented a threat to the safety of the community in general and the Government witnesses against him in particular, but noted that these were insufficient grounds on which to deny bail under the Bail Reform Act of 1968, 18 U.S.C. §3146 et seq. (108a).

Chief Judge Mishler thereupon imposed additional restrictions on Lucchetti's release, particularly with regard to travel and residency (109a-110a). On January 31, 1975, after the foregoing decision was rendered and in conformity therewith, all of the sureties involved, including appellants, executed a bail bond expressly enumerating the bail restrictions imposed by Chief Judge Mishler (111a).

On March 12, 1975, upon information received from the Federal Bureau of Investigation, the United States Attorney moved the trial court, pursuant to Rule 46(e)(1), F.R.Cr.P., to forfeit the bail posted on the ground that Lucchetti had breached the condition restricting him to the Township of Islip. Lucchetti and two confederates, Walter Miller and Robert Rinaldo, had taken the car of Lucchetti's cousin, Matty Santoro (the son of appellant Rose Santoro), and drove to New Jersey on the morning of February 25, 1975 to rob the People's Bank of South Bergen.

Enroute, Lucchetti and his accomplices stole another automobile; this vehicle was to be used to transport Miller and Rinaldo to and from the bank, while Lucchetti remained in the Santoro "switch" car. Lucchetti also supplied Miller and Rinaldo with a shotgun to be used in effecting the robbery. Unfortunately for Lucchetti, the robbery was interrupted by the local police and Miller and Rinaldo were captured after a short chase (116a-119a).

On April 10, 1975, the Grand Jury returned yet another indictment charging Lucchetti with conspiracy to violate 18 U.S.C. §§2113(a) and (d) (75 CR 288). It is to be noted that this armed robbery took place while Lucchetti was breaching Judge Mishler's specific instruction that he (Lucchetti) remain in the Township of Islip. Moreover, Matty Santoro subsequently informed the FBI that he had lent his car to Lucchetti on the day of the robbery in New Jersey, that Lucchetti had subsequently phoned him (Santoro) to complain that Miller and Rinaldo had implicated him (Lucchetti) in the Jersey robbery, and that Lucchetti refused to advise Santoro of his (Lucchetti's) whereabouts (120a-121a).

Informed of the foregoing, the District Court declared bail forfeited, but stated that the forfeiture would be set

aside if Lucchetti was surrendered to the Court by 4:00 P.M. of the following day (122a). The propriety of the trial court's ruling in this regard is not challenged on appeal, (Brief for Appellants, at 14) and, indeed, it is conceded. The sureties failed to produce Lucchetti by the date and time set by the Court as a prerequisite to setting aside the forfeiture (which Chief Judge Mishler was clearly prepared to do).

More than two weeks later on March 31, 1975, the date set for trial, Lucchetti failed to appear, and the District Court declared him a fugitive. On the same day, Chief Judge Mishler granted the Government's application for judgment on the bail forfeiture previously declared and ordered execution by sale of the properties posted by the sureties-appellants (127a-128a). On April 2, 1975, the Court further ordered the judgment enforced by execution against the properties posted by the other sureties other than appellants (3a). Lucchetti surrendered the following day.

On April 10, 1975, appellants herein moved for remission below, notwithstanding their failure to produce Lucchetti as originally required by the District Court and their failure to timely object to the entry of judgment against them. In support of their joint motion, appellants filed a series of

affidavits detailing their attempts to secure Lucchetti's surrender. In accordance with its prior admonition of March 12, 1975 that the forfeiture would be remitted only if Lucchetti surrendered by the afternoon of the 13th, the District Court denied the motion for remission without opinion. It is from the denial of this application that the instant appeal ensues.

ARGUMENT

THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION: JUSTICE REQUIRES THE ENFORCEMENT OF THE JUDGMENT BELOW

Appellants do not contest the propriety of the bail forfeiture declared by the District Court. Their dispute lies, rather, with the District Court's alleged "failure" to grant remission. It is appellants' claim that Chief Judge Mishler never fully considered all of the relevant factors involved, and that he gave no more than cursory examination of the financial difficulties his decision would impose upon appellants.

While we concede that neither the Government nor the District Court disputed the factual assertions of the appellants' with regard to their various and sundry "efforts" to recapture Lucchetti after he jumped bail, or the financial impact the enforced judgment would have on them, we submit that none of the other contentions of appellants have merit, and that the determination of the District Court with respect to this matter should be in all respects affirmed.

As the Statement of Facts makes clear, the denial of remission below was only one of a great number of discretionary determinations the District Court was called upon to make with respect to the question of Lucchetti's pre-trial release and

the disposition of the numerous bank robbery and conspiracy charges lodged against him by the Grand Jury.[2/] (Lucchetti had been before Judge Mishler with great frequency since 1971, when the Grand Jury had first indicted him.) The Court's denial of the application for remission must be viewed, therefore, in the context of the proceedings as a whole, rather than in a relative vacuum as presented by appellants.

Moreover, Lucchetti's frequency of appearance before Judge Mishler and the number of decisions the court was called upon to render with respect to Lucchetti make it obvious that Judge Mishler was well aware of every conceivable factor "relevant" to the matter of remission, and that he was, at all times, congnizant of the serious financial risks the Santoro family (and the other sureties below) had voluntarily shouldered to keep Lucchetti out of prison.

On December 24, 1974, counsel for Lucchetti appeared before the District Court to request, on behalf of "the family" that the Court's insistence on a surety company bond, which neither Lucchetti nor his family could afford, be relaxed to allow the family to post four houses "as security" (50a-51a).

2/ Such charges entail a "high degree of risk of failure to appear." United States v. Kirkman, 426 F.2d 747, 750 (4th Cir. 1970).

After an extended colloquy vis-a-vis the value of the homes to be posted (54a-56a), counsel represented to the trial court that the family was willing to be "tied up asset-wise", in order to secure Lucchetti's release (57a). To this assertion, the Court responded (58a-59a) in pertinent part):

> I wouldn't reduce it [bail] one nickel. But if the family is willing to put up all this security . . . let the whole family lose everything - - I would be inclined to do it. But let them know the risks.

It is abundantly clear from these statements, as well as others made throughout the proceedings, 3/ that Judge Mishler from the outset was aware of and genuinely concerned about the possiblity that the Santoros (as well as the non-appealing sureties) were risking severe financial hardship in guaranteeing Lucchetti's obligations under the bond executed herein.

Subsequently, of course, upon the handing down of Indictment 75 CR 25, charging Lucchetti with involvement in three additional armed bank robberies, bail was raised to $200,000 and Lucchetti's travel and residence restricted to the Township of Islip. Once again, the family came forward to voluntarily risk the equity in the involved property (67a-68a; see, also, 111a). By this time Lucchetti had been indicted on no fewer

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3/ For example, on March 31, 1975, the Court stated (128a):

> When somebody signs a surety bond on the bail bond, they know what they are doing. I explained it at great length. I explained the risk because I could almost predict what was going to happen, and you [appellants] were willing to take the risk and you lost.

than four armed bank robberies, a factor of which the family was no doubt fully aware, since the second indictment was, in large measure, the predicate for the increase in bail from $75,000 to $200,000, and resulted in the sureties execution of the new bond (111a).

It is undisputed that Lucchetti subsequently violated the travel and residence restrictions imposed upon his release by the District Court. Moreover, these violations were far from merely "technical"; on February 25, 1975, Lucchetti left the Township of Islip, New York and travelled to South Bergen, New Jersey, where he participated in yet another armed bank robbery (compare United States v. D'Argento, 339 F.2d 925 (7th Cir. 1964), cert. denied, 389 U.S. 833 (1967)). Furthermore, Lucchetti could not be located for a period of at least three weeks and did not appear for trial on March 31, 1975.

Although the District Court was well aware of the blatant, if not contempuous, nature of the breach of bail involved herein, it still exercised its discretion under Rule 46(e)(2), F.R.Cr.P., and conditioned the enforcement of the ensuing forfeiture by giving the appellants and the other sureties below a limited amount of time within which to produce Lucchetti (122a). It is to be remembered that appellants neither dispute the trial court's initial decision to forfeit bail nor

contest or question the propriety of Judge Mishler's conditioning the setting aside of the forfeiture on the timely return of Lucchetti to custody. Hence, it is impossible for the Government to understand how appellants can successfully maintain the instant appeal in the light of these concessions, since Judge Mishler's admonition to the effect that the forfeiture would be set aside/remitted only if Lucchetti was surrendered by the time specified serves as the obvious predicate to his "summary" denial of the application for remission.

Moreover, looking beyond the facts of the instant appeal, it is clear that the law of this Circuit and the Courts of Appeals for the other circuits support Judge Mishler's decision below.

In United States v. Agueci, 379 F.2d 277 (2d Cir. 1967), cert. denied, sub nom. Stuyvesant Insurance Co. v. United States, 389 U.S. 879 (1967), this Court approved a denial of a motion to set aside a bail forfeiture predicated on a failure to appear for trial. The defendant therein, after telling his family he was going to New York to appear at trial, left his Toronto home on October 8. 1961. His body was found in upstate New York on November 23, 1961. The medical examiner testified that at most the defendant had been dead two weeks - still a month after

Ageuci left Toronto. The District Court rejected the theory that the defendant had been kidnapped, because of insufficiant evidence. As stated in that opinion (379 F.2d at 278)):

> To obtain bail, Ageuci persuaded one Frank Cutrona to execute a $10,000 mortgage on his house as security for the bond. Cutrona now stands to lose his house. Ageuci's wife had guaranteed the remaining portion of the bond and apparently has had to sell her Toronto home to meet the bond's terms.

Notwithstanding the hardships involved, the District Court insisted on forfeiture of the bond. The District Court reasoned that the seriousness of the felony charged (narcotics violation), and the public policy in and necessity of effectuating appearances in such cases, both outweighed the "humanitarian appeal" in the case. This Court affirmed.

Equally in point on this appeal is the case of United States v. Accardi 241 F. Supp. 119 (S.D.N.Y., 1964), which involved an "innocent" surety whom the Court regarded as having "exerted (costly) efforts to locate the defendant and have him returned to this district". (241 F. Supp. at 120). Nevertheless, the Court did not exercise its discretion in favor of the surety. This Court affirmed sub nom. United States v. Peerless Insurance Co., 343 F.2d 759 (2d Cir., 1965), cert. denied, 382 U.S. 832 (1965).

See also, United States v. Public Service Mutual Insurance Co., 282 F.2d 771 (2d Cir., 1960), affirming a forfeiture of bail where the defendants' capture "came about through information furnished by the " surety-appellant therein.

We also believe that the District Court's refusal to remit the judgment below is supported by a number of decisions from other circuits. For example, in Smith v. United States, 357 F.2d 486 (5th Cir. 1966), the Court of Appeals acknowledged that the surety's successful efforts to secure the capture of the defendant were "commendable", but, citing, inter alia, the Public Service Mutual Insurance Co. decision of this Court, supra, held that the District Court there involved did not abuse its "wide discretion" under Rule 46 in refusing to remit/set aside a bail forfeiture. 357 F.2d at 490.

Moreover, appellants herein seemingly contend that Judge Mishler's disposition of their application for remission, without an evidentiary hearing or the rendering of a full memorandum decision, in some mysterious way signifies an inability on his part to understand and deal with questions presented fairly and correctly. However, since December, 1974, several separate, but related, hearings regarding the amount, conditions and forfeiture of bail had been held by the District Court and served

to "set the stage" for the denial of the application for remission. In this regard, we quote the penultimate paragraph of Smith, supra, 357 F.2d at 490:

> As its last ground of appeal, Resolute [appellant] argues that the trial court erred in ordering the clerk not to accept appellant's petition for permission to file a petition for remission. Since the matter of setting aside or remitting the forfeiture had been fully presented, heard, and decided in three prior motions, we do not believe the trial court's action constituted reversible error.

Similarly, of course, Chief Judge Mishler's familiarity with the entire case, and his decision in open court on March 12, 1975, as to when and on what conditions the bail forfeiture would be set aside, permitted him to "summarily" determine and deny the application for remission without the necessity of yet another time-consuming series of oral arguments and hearings. See, also, United States v. Caro, 56 F.R.D. 16, 18 (S.D.Fla. 1972).

In Williams v. United States, 444 F.2d 742 (10th Cir. 1971), the surety "made no attempt to in any way show the court that a default judgment should not be entered" upon the forfeiture, but "tardily" sought remission. The Court of Appeals affirmed the denial of remission as a proper exercise of the trial court's discretion. This is clearly analogous to the instant appeal,

wherein the appellants have never objected and do not now object to either the conditions set down by Chief Judge Mishler as a prerequisite to setting aside the forfeiture or to the entry of judgment thereon. Instead, the appellants rather "tardily" seek to assign error to the discretionary denial of their application. As in Williams, supra, we believe that the Court should affirm the exercise of discretion by the court below.

See, generally, 3 Wright, Federal Practice and Procedure, Ch. 11, pp. 294-296 (1969).

In their brief, appellants contend at some length that the law of "sister circuits" does not support the decision of the court below. In support of this contention, appellants rely on United States v. Kirkman, 426 F.2d 747 (4th Cir. 1970), United States v. Foster, 417 F.2d 1254 (7th Cir. 1969), Sifuentes-Romero v. United States, 374 F.2d 620 (5th Cir. 1967), and Smith v. United States, supra. We submit that appellants' reliance on this case is sorely misplaced.

Smith, the earliest (1966) of these decisions, admittedly involves a remission with respect to the forfeiture of one bond, combined with a refusal to remit with respect to another. The propriety of the remission, however, was not an issue on appeal, and the Court of Appeals offered no view on whether the surety was "entitled" to it. Certainly its affirmance with respect to

the second bond militates against the proposition for which it is cited by appellants. (Brief for Appellants, at 12.).

Sifuentes-Romero, supra, involved an appeal from a judgment entered on a bail forfeiture. Prior to entering judgment, the District Court, as in the instant appeal, gave the surety a time certain within which to produce the missing defendant. The defendant, however, was not produced, and judgment was entered against the surety notwithstanding his explanation that the defendant was incarcerated in Mexico and had been throughout the period in question. On appeal, the Fifth Circuit specifically held "[w]e find no defect in the forfeiture procedure followed." 374 F.2d at 621.

Foster, supra, is easily distinguishable from the instant appeal, inasmuch as the record herein more than adequately demonstrates the trial court's awareness of and sensitivity to the relevant factors, such as the "blatancy" of Lucchetti's bail bond violations (i.e. traveling to New Jersey to participate in a bank robbery; not appearing for trial; absenting himself from home for an extended period of time). See 417 F.2d at 1258, where the Seventh Circuit specifically held the "blatancy" of the violation to be a relevant consideration with respect to remission.

Kirkman, supra, to the extent here relevant, is equally distinguishable, inasmuch as it involved a hospitalized bail jumper who "was placed under guard in the hospital and, upon discharge from the hospital, was kept in jail until he was tried." 426 F.2d 747 (9th Cir. 1970). Clearly, the relevant factors enunciated in Foster, supra, and the public policy considerations articulated in Ageuci, supra were not present in Kirkman, and the result therein is, therefore, understandable. Moreover, we note that Kirkman did not involve the setting of any conditions by the trial court upon which remission would be predicated. In the instant appeal, just the opposite is the case.

CONCLUSION

Upon the record below, and for the reasons hereinbefore set forth, the denial of remission of the judgment below should be affirmed.

Dated: June 23, 1975

Respectfully submitted,

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Sir:

You will please take notice that a ..... *of which the within is copy, was this day duly entered in the within entitled action, in the office of the Clerk of this Court.*

Dated, Brooklyn, New York ..... *19* .....

Yours, etc.,

.....

United States Attorney,

Attorney for .....

To

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Attorney for .....

Sir:

Please take notice that the within ..... *will be presented for settlement and signature to the Honorable* ..... *at the office of the clerk,* .....

Borough of ..... *City of New York, on the* ..... *day of* ....., *19* ....., *at* ..... *o'clock in the* ..... *noon, or as soon thereafter as counsel can be heard.*

Dated, Brooklyn, New York ..... *19* .....

Yours, etc.,

.....

United States Attorney,

Attorney for .....

To

.....

Attorney for .....

Court Index No. 75-1212

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BRIEF

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Due service of a copy of the within is hereby admitted.

New York, June 24, 19 75

H. ELLIOT WALES, ESQ.

Attorney for
Sureties-Appellants

To

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Attorney for .....

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